No. 651

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

MELDON MITCHELL, *Petitioner*,

v.

THE FLINTKOTE COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

SAUL J. LASSER,
GEORGE H. SCHWARTZ,
Counsel for Petitioner,
61 Broadway,
New York, N. Y.

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THE FLINTKOTE COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Meldon Mitchell prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above-entitled case on January 4, 1951.

OPINION BELOW.

The trial court's charge to the jury (R. 248-255) is not reported. It wrote no opinion. The opinion of the Court of Appeals for the Second Circuit (R. 418-23) is reported at 185 F. 2d 1008.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was entered on January 4, 1951 (R. 423-4). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND EXECUTIVE ORDERS INVOLVED.

Executive Order No. 9001, and the relevant provisions of Executive Order No. 10211, the Armed Services Procurement Act of 1947, the Federal Property and Administrative Services Act of 1949, and the other statutes involved, are set forth in the Appendix, pp. 27-36, *infra*.

QUESTIONS PRESENTED.

(1) Whether Executive Order No. 9001 states a public policy against the enforceability, between the parties, of contracts providing for contingent compensation for obtaining or securing Government contracts, though nothing improper or detrimental to the public interest was done or contemplated pursuant to the contingent fee contract.

(2) Whether a contract for contingent compensation for obtaining Government contracts is enforceable between the parties where it appears that the parties to the contract for contingent compensation did and contemplated doing nothing improper or detrimental to the public interest pursuant to their contract.[1]

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[1] Petitioner reserves the right, if certiorari is granted, to argue that the contingent fee contract in question was not one to obtain or secure Government contracts, but rather generally to promote the sale of certain products to the Government through consultation with the Government on technical matters, and to argue other questions raised by the case.

STATEMENT.

This is a diversity suit for breach of contract brought by the petitioner, a citizen of New York, against the Flintkote Company, a Massachusetts corporation.

The complaint, dated August 29, 1947, alleged a contract made in January 1942 by which petitioner agreed to continue working, as he had done theretofore, to cooperate with defendant Flintkote to develop and utilize defendant's products for purposes of military camouflage and to promote the sale of such products to agencies of the federal Government for the purposes of military camouflage. In return defendant agreed to pay petitioner 3 per cent of its sales to Government agencies of materials for purposes of camouflage. It was further alleged that the petitioner had performed his contract but that defendant had not, though since January 2, 1942 it had made sales of such materials in an amount alleged upon information and belief to be in excess of $5,000,000 (R. 2-5). The answer made what was in substance a general denial and pleaded that the contract alleged was illegal and void as contrary to public policy (R. 6-8).

The case was tried before the Hon. John W. Clancy, D. J., and a jury. There was the following testimony to support the verdict of the jury for petitioner.

Petitioner is an industrial designer, trained at an engineering school and in universities and schools in art and design (R. 20-21). He is an expert in the field of military camouflage, with experience dating back to World War I, when he commanded the Marine Corps' school of camouflage, with the rank of gunnery sergeant (R. 21-28, 103). Between the wars and in World War II, he wrote, lectured and worked with the Army, Navy and Marine officers in the field of camouflage (R. 23-

27). He received no compensation from the Government for this work and at the end of World War II he was cited by the War Department for his contributions to military camouflage (R. 28, Pltff's exh. 1, R. 258).

Defendant manufactures building materials and paint, including paint suitable for camouflage purposes (R. 35, 156, 196). Petitioner first came to defendant in November 1940, as a result of of his work with the Army, in pursuit of a manufacturer capable of making newly devised camouflage materials and of adjusting existing production to the camouflage needs of the War Department (R. 28-30, 36). Between that time and our entry into the war, he acted as an uncompensated intermediary between defendant and the military authorities and had frequent discussions with both on camouflage and on defendant's capacities to produce camouflage materials (R. 31-52, Pltf's Exh. 2-6, 8-11, R. 259-63, 269-74). In April of 1941, petitioner proposed a contract to defendant, but defendant thought it premature (R. 47-8, Pltff's Exh. 7, R. 264-8).

Petitioner testified that on our entry into the war he visited Washington to discuss the military camouflage program. On his return, he discussed the matter on January 5, 1942, over the telephone, with defendant's vice-president, Neher, and raised again the question of a contract. He testified that he then reached an agreement with Neher to give defendant part of his time to cooperate with the Government and defendant in camouflage matters and in bringing defendant to the attention of Government camouflage officers as a source of materials, in return for three per cent on all defendant's sales of camouflage materials to the Government during the war (R. 52-57, 104-6). Petitioner's testimony as to the agreement was contradicted by Neher.

Neher, who had previously denied any agreement, admitted on the stand that an agreement had been reached, though different from petitioner's version. Aside from such matters as demeanor on the stand, his changing testimony as to the agreement, on questioning by counsel and by the court, and on other matters, was such that the jury could have found him not to be a credible witness (R. 163-6, 170-1, 178-80, 182-3, 185, 188-94, 218-29, 240-6, Pltff's Exh. 12-13, R. 275-6, R. 73-6).

The petitioner testified to his activities in the performance of the contract. He reported developments in Washington to defendant, discussed technical problems and new products needed for camouflage, procured samples for submission to the authorities, and visited the Army, Navy, Marines, and Civil Defense camouflage officers in Washington to bring to their attention defendant's capacities to produce camouflage materials (R. 57-67, 72-3). Col. R. P. Breckenridge, who organized the camouflage section at the Army Engineer Board, Ft. Belvoir, in January 1941 and continued in charge until about June 1942, testified in corroboration. He testified to the meetings with petitioner and, at petitioner's suggestion, with defendant, and to continued discussions and correspondence with petitioner on varied camouflage subjects and on defendant's capacity to produce camouflage materials (R. 77-93). He testified that petitioner repeatedly recommended defendant as a source of camouflage materials (R. 80-1, 88-9, 92-3). Neher testified that the Army Engineer Board had designated defendant as an approved source of camouflage paint (R. 190-1).

With respect to the nature and propriety of petitioner's services, it appeared from both petitioner's and Neher's testimony that petitioner was not a sales-

man but a technician and that defendant had at least one other representative located in Washington, whose function it was to make contacts (R. 41, 55-6, 62-3, 103, 168, 170-6, 179-80, 182-3, 185, 187, 237). Petitioner testified that the men he saw in the course of furthering defendant's interests had no power to buy the products which petitioner represented (R. 146). His access to such officers was on the basis of common knowledge of the profession of camouflage (R. 107-8). Both Col. Breckenridge and the petitioner testified that the petitioner made frequent disclosure of his representation of defendant (R. 38-40, 80, 88-9, 93). Col. Breckenridge testified that petitioner had "very definitely" cooperated with respect to the development of camouflage materials and that "some of his ideas were extremely good and others were like the ideas of many of us, not so practical" (R. 79, 92). Col. Breckenridge testified further that the Army Engineer Board had no procurement authority or functions; that it investigated and tested the usability of materials for camouflage purposes and prepared specifications for such materials for use by procurement officers elsewhere in the Government. Customarily, too, the Board made recommendations, for the use of procurement officers, of available sources for these materials and its policy was to designate among the sources those who had assisted in the development or were in a position to supply the material (R. 85-8, 91-2, 100-2). Neher testified that defendant's contracts for the sale of camouflage paint to the Government were in every case based upon public advertisement and competitive bidding (R. 191, 216, 227). There was no testimony as to the terms of defendant's contracts with the Government and as to whether the contracts contained a warranty against contingent fees for obtaining the contract.

Defendant supplied the amounts of its sales of camouflage paint to the Government, between January 2, 1942 and August 16, 1945, the conclusion of hostilities (R. 158-60, 191, Pltff's Exh. 14, 15, R. 277-82). It is not disputed that the sum due petitioner, if the contract was made and performed and is enforceable under public policy, is $19,832 (R. 253).

Defendant made no objection to the charge to the jury (R. 248-55), with one exception. Judge Clancy refused a request of the defendant to charge that "Contracts of employment, the performance of which involve the procurement of public contracts, are against public policy and unenforceable if the compensation to be received by the person so employed is contingent upon his success in procuring such contracts. It makes no difference in this regard that the services rendered were legitimate and involved no wrongdoing on the part of plaintiff . . ." (R. 248, 255, 257). Defendant took an exception to the refusal to give this charge and made motions for a directed verdict and to set aside the verdict, grounded on the view of the law in the requested charge. These motions were denied (R. 195, 256).

The jury returned a verdict for petitioner for $19,832 and judgment was entered, with interest allowed by the court (R. 256-7, 411). On appeal, the Court of Appeals for the Second Circuit (Circuit Judges Swan, L. Hand, Frank) reversed and dismissed the complaint (R. 418-23). The Court of Appeals held that paragraph 5, Title II of Executive Order No. 9001 (Appendix, p. 27, *infra*) states a public policy against the enforceability, between the private parties, of contingent fee contracts for obtaining contracts with the federal Government, without regard to whether anything sinister or improper was done or con-

templated pursuant to the contract (R. 420-421). The court further held that the public policy is applicable though defendant's contracts with the Government resulted from competitive bidding (R. 420); that it is immaterial that there was no showing that the contracts with the Government contained such a warranty against contingent fee contracts as is specified by the Executive Order (R. 420); and that petitioner's contract with defendant was one to secure Government contracts (R. 421). This petition for certiorari followed.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that Executive Order No. 9001 creates a rule of public policy against the enforceability of contracts for contingent compensation for soliciting or obtaining contracts with the federal Government, without regard to whether anything sinister or improper was done or contemplated pursuant to the contract.

(2) In failing to hold that such contingent fee contracts are enforceable unless it appears that the parties did or intended to do improper or corrupt acts pursuant to the contract.

(3) In failing to hold that the contract between petitioner and defendant Flintkote was enforceable.

(4) In failing to hold that petitioner and defendant Flintkote Company did or intended to do nothing improper or corrupt pursuant to the contract between them.

(5) In holding that the contract between petitioner and Flintkote Company was one to solicit or secure Government contracts.

(6) In failing to hold that the evidence was sufficient to support the verdict of the jury for petitioner.

(7) In reversing the judgment and in dismissing the complaint.

REASONS FOR GRANTING THE WRIT.

(1) The Court of Appeals seems to have started from the correct premise that under this Court's decisions as they stood prior to Executive Order No. 9001, the contract between petitioner and Flintkote, though regarded as one to secure a contract with the Government, was enforceable between the parties if there were no evidence of improper acts done or contemplated to be done pursuant to the contract (R. 421-2). *Steele* v. *Drummond,* 275 U. S. 199; *Valdes* v. *Larrinaga,* 233 U. S. 705; *Oscanyan* v. *Arms Co.,* 103 U. S. 261. Cf. *Winton* v. *Amos,* 255 U. S. 373, 392-3; *Stanton* v. *Embrey, Administrator,* 93 U. S. 548, 556. See *Coyne* v. *Superior Incinerator Co. of Texas,* 80 F. 2d 844 (C. A. 2); 6 Williston, *Contracts* (Rev. Ed.) Sec. 1729A. It departed from this rule and refused to look at the evidence, under its holding that paragraph 5 of Title II of Executive Order No. 9001 stated a "rigorous" federal public policy against the enforceability of contingent fee contracts, without exception (R. 421-2).[2]

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[2] The Court of Appeals intimated (R. 421) that the "older" Supreme Court cases refused to enforce such contracts without regard to the evidence of impropriety. But these older cases have been distinguished by this Court itself as invariably based on facts showing that improper or corrupt acts were done or intended to be done. *Steele* v. *Drummond,* 275 U.S. 199, 206. It is interesting to note that Mr. Justice Holmes' opinion in *Hazelton* v. *Sheckells,* 202 U.S. 71, is most often cited, and was cited by the court below (R. 421) for its language condemning such contracts without regard to the evidence of impropriety. Yet it was Mr. Justice Holmes

Executive Order No. 9001 (Appendix, p. 27 *infra*), promulgated on December 27, 1941, pursuant to authority granted by the First War Powers Act, 1941, authorized the agencies of the Government[3] to enter into contracts without regard to the provisions of law relating to Government contracts. Title II of the Order consists of regulations for the exercise of the authority granted. Paragraph 5 of Title II provides:

> Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:
>
> The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this war-

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who seven years later wrote, again for a unanimous court, matter-of-factly enforcing such a contract and distinguishing *Hazelton* v. *Sheckells*, because the Court could "discover nothing in the language of the letters [embodying the contract] that necessarily imports, or even persuasively suggests any improper intent or dangerous tendency." *Valdes* v. *Larrinaga*, 233 U.S. 705. 709. In *American Seating Co.* v. *Zell*, 322 U.S. 709, the *per curiam* opinion states that three judges were of the opinion that the contract, one for a contingent fee, was against public policy and void, citing *Hazelton* v. *Sheckells* and Executive Order No. 9001. The opinion of the three judges is no doubt attributable to the showing in the record in the *Zell* case that the object of the contract was the improper sale of influence and that the parties, conscious of the impropriety, kept their agreement a secret. No. 613, Oct. Term, 1943, R. 6-7, 22-24.

[3] At the outset Executive Order No. 9001 applied only to the War and Navy Departments and the Maritime Commission, but it was extended to substantially every agency of the Government. The several Executive Orders extending Executive Order No. 9001 are set out at 50 U.S.C. App. § 611 ff.

> ranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

The Court below held that this provision "flatly requires" that no one be employed to solicit Government contracts. "No exception is made for cases in which nothing sinister was contemplated or done under the terms of the contingent fee contract" (R. 421). Accordingly, it concluded, in effect, that paragraph 5 required it to presume detriment to the public interest, contrary to the express injunction of this Court in *Steele* v. *Drummond,* 275 U. S. 199 at 205.

This holding illustrates the evil of ignoring this Court's frequent warnings against judicial creation of a public policy interfering with freedom of contract on the basis of any but unequivocal expressions of Congressional intent. *Muschany* v. *United States,* 324 U. S. 49, 65-67; *Steele* v. *Drummond, supra; Twin City Co.* v. *Harding Glass Co.,* 283 U. S. 353, 356-7; *United States* v. *Bethlehem Steel Corp.,* 315 U. S. 289, 308-9, dissenting opinion of Frankfurter, J., 312 at 334; *Bank of Augusta* v. *Earle,* 13 Pet. 519, 597. For paragraph 5 of Title II of Executive Order No. 9001 is a weakling source for an uncompromising public policy outlawing all contingent fee contracts.

(a) First, the Executive Order shows no awareness that it states a public policy against the enforceability of contracts for a contingent fee for securing a Government contract. Title I contains a preamble which is no doubt a statement of public policy, but the subject matter is far loftier than contingent fee contracts. Title II sets out regulations for implementing the authority granted in Title I to let contracts without regard to governing provisions of law. Paragraph 5 of Title II requires that a specified warranty against contingent fees appear in contracts entered into pursuant to the Order. The warranty not only contains an exception, but it states the sanctions for contracts which offend it—deduction of the fee from the contract price or annulment of the contract. The additional sanction of unenforceability as between the private parties should not be supplied by the courts, without some strong showing. *Frost & Co.* v. *Mines Corp.*, 312 U. S. 38. The state courts have so held, in cases involving the Executive Order. *Ebeling* v. *Fred J. Swaine Mfg. Co.*, 357 Mo. 549, 209 S. W. 2d 892, 895 (Sup. Ct. Mo.); *Bradford* v. *Durkee Marine Products Corp.*, 180 Misc. 1049, 40 N. Y. S. 2d 448 (Sup. Ct.); *Singer* v. *Bruner-Ritter, Inc.*, 180 Misc. 928, 42 N. Y. S. 2d 881, aff'd 266 App. Div. 953, 44 N. Y. S. 2d 589, app. den. 266 App. Div. 993, 45 N. Y. S. 2d 411 (1st Dept.).

(b) Second, paragraph 5 is hardly a new departure warranting a change in the law developed by this Court. The paragraph merely restates an administrative practice of many years standing. A similar warranty was first used by the Government in 1918, after the matter went to President Wilson for his personal decision. A clause identical with that required by paragraph 5 has been in the standard form for Government construction contracts since 1923 and in the form for supply

contracts since 1927. See the historical memorandum by Robert E. Kline, Special Assistant to the Undersecretary of the Navy, Hearings before the House Naval Affairs Committee pursuant to H. Res. 162, July 16, 1942, 77th Cong., 2nd Sess., pp. 1185-1190. It is clear from the history and purpose of the warranty that it has never been intended to change the public policy as expressed in this Court's opinions or to outlaw such contracts without regard to the facts. In the course of formulating an exception to the warranty (the predecessor of the exception presently in Executive Order 9001), President Wilson put it that the "single object" of the Government in requiring the warranty "was to prevent the contingent fee based upon no real service whatsoever" and to exclude those "who may seek to trade upon their supposed influence." *Ibid,* p. 1188. That purpose has not changed to this very day, as will appear.

(c) Third, the administrative agencies charged with the enforcement of the warranty in paragraph 5 have uniformly held that whether a given contingent fee contract violates the warranty clause is a matter to be determined on all the facts and circumstances, such as whether personal influence or legitimate services were intended, the scope of the agent's employment, and the contribution of the agent to the war effort. *North American Iron & Steel Co. Inc.* v. *Navy Department,* 1 Appeal Bd., Office of Contract Settlement, No. 116, Feb. 7, 1947, 4 CCF ¶ 60,238; *Alloy Products Corporation,* Army Board of Contract Appeals, No. T-1571, Div. No. 1, Oct. 1, 1947, 4 CCF ¶ 60,389; Op. No. B-26993, 22 Comp. Gen. 124.

These administrative agencies approve contingent fee contracts on looking to the purpose, rather than the

words, of the exception in the warranty in favor of contracts with "bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business." For instance, the Judge Advocate General has ruled generally that contingent fee contracts are permissible if made with "a bona fide agent." See *Reynolds* v. *Goodwin-Hill Corporation,* 154 F. 2d 553, 555, M. 2 (C. A. 2). And the Comptroller General, approving a contingent fee contract with a real estate broker,[4] relied upon the exception in paragraph 5 to show that "in some instances dealing with agents or contractors is not objectionable and, in fact, may be desirable from a Government standpoint. . . . Apparently, it is not the purpose of the provision of the Executive Order . . . to interfere with the ordinary trade practices of persons desiring to contract with the Government." Op. No. B-26993, 22 Comp. Gen. 124, 126. Government counsel have taken this position. In *United States* v. *Buckley,* 49 F. Supp. 993, 995 (D. C. D. C.), Chief Judge Laws noted that "the prosecution frankly has conceded there is question as to the meaning of the words 'maintained by the contractor,' in the President's order, and that reason would seem to compel the view that the contractor would not offend the order simply because he occasionally employed a broker to obtain a contract."

This view has prevailed until this writing. The administrative officers who are today passing on these contingent fee contracts continue to use this standard. On March 14, 1951, Rear Admiral M. L. Ring, Mili-

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[4] A real estate broker is perhaps the type of agent who could least be said to be "maintained" by his principal. Certainly he is no more "maintained" by the contractor than petitioner was maintained by Flintkote.

tary Director for Procurement, Munitions Board, testified as follows before a Congressional committee (Hearing before the Senate Investigations Subcommittee of the Committee on Expenditures in the Executive Departments, March 14, 1951, p. 4359):

> Each case must, of course, be decided on its own merits since a relationship may be proper at one time but improper another. In passing on each case we try to establish who is a bona fide employee or a bona fide established commercial or selling agency and who is not.[5] It must be remembered that it is general business practice in certain segments of industry to employ representatives while in others it is not. Also, big business can afford a full-time Washington representative—small business cannot.
>
> The decisions in some cases are not easy since there are no categorical guideposts set up whereby we can judge whether or not the warranty of the contingent fee clause has been breached as each case must be decided on its own particular facts. How-

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[5] The warranty clause currently in use is that specified in Part 1(10) of Executive Order No. 10211 of February 2, 1951, in Section 4(a) of the Armed Services Procurement Act of 1947, and in Section 304(a) of the Federal Property and Administrative Services Act of 1949. It differs from the warranty prescribed in Executive Order No. 9001 only in excepting contracts with a "bona fide employee" in addition to those with "bona fide established commercial or selling agencies maintained by the contractor." (Appendix, pp. 31, 33, 34, *infra.*)

It is plain from the testimony at the hearings quoted from in the text that the Government does not understand the restatement of the warranty in the two new statutes and in the new Executive Order to mark a change in the public policy or even the administrative practice with respect to contingent fee contracts.

ever, it is not too difficult as long as the real intention of the Congress—the elimination of the influence peddler—is kept in mind.

This statement of the administrative standard is essentially that laid down by President Wilson and by this Court—of striking down only the contingent fee contract which does not spring from normal, legitimate business, but whose purpose or performance involves something sinister or improper, detrimental to the public interest. This has been the holding (in conflict with that of the court below) of the several state courts which have passed on the effect of paragraph 5 of Title II of Executive Order No. 9001. *Glass* v. *Swimaster Corp.*, 74 N. D. 282, 21 N. W. 2d 468; *Ebeling* v. *Fred J. Swaine Mfg. Co.*, 357 Mo. 549, 209 S. W. 2d 892; *Leahy* v. *Brooklyn Waterfront Terminal Corp.*, 272 App. Div. 781, 69 N. Y. S. 2d 596 (2d Dept.). Cf *Hall* v. *Anderson*, 18 Wash. 2d 625, 140 P. 2d 266; *Weinstein* v. *Palmer*, 226 Minn. 64, 32 N. W. 2d 154; *United States* v. *Buckley*, 49 F. Supp. 993 (D. C. D. C.).[6]

(d) Fourth, it is affirmatively demonstrable that Executive Order No. 9001 does not state an uncompromising public policy against the enforceability of contingent fee contracts. The Congress has since unmistakeably stated that it does not desire that these contracts be illegal or unenforceable without regard to the facts.

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[6] The court below has in two cases suggested that Executive Order 9001 states a public policy against enforcement of a contingent fee contract made to procure a single, specific contract. *Bradley* v. *American Radiator & Standard San. Corp.*, 6 F. R. D. 37 (S.D.N.Y.), aff'd. 159 F. 2d 39 (C.A. 2); *Reynolds* v. *Goodwin-Hill Corp.*, 154 F. 2d 553 (C.A. 2).

A hint that Congress intended to speak on the subject appears in the legislative history of Title II of the hurriedly passed First War Powers Act, 1941 (55 Stat. 839), pursuant to which Executive Order No. 9001 was issued. 87 C. R. 9865, 77th Cong., 1st Sess.[7] In the next session, beginning in January 1942, hearings were held and public attention paid to the subject of contingent fee contracts. Shortly thereafter the House passed H. R. 7304, which explicitly made such contracts unlawful and "invalid and unenforceable." H. R. 7304, set out at 88 C. R. 6411, 77th Cong., 2nd Sess.[8]; H. Rep. No. 2356. 77th Cong., 2nd Sess.; Hearings before the House Committee on Naval Affairs pursuant to H. Res. 162, May 29, 1942, July 15 and 16, 1942, 77th Cong., 2nd Sess.; Hearing before the House Committee on Naval Affairs on H. R. 7304, July 17, 1942; 88 C. R. 5589, 6409-20, 6423, 6426, 77th Cong., 2nd Sess.

Had it been enacted, H. R. 7304 would of course have stated the rigorous and uncompromising public policy which the Court of Appeals believed was to be found in Executive Order No. 9001. But the Senate Committee on Naval Affairs deliberately rejected the bill,

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[7] Mr. Kefauver, a member of the committee reporting the bill which became the First War Powers Act, said (87 C.R. 9865):

> As to the section that deals with contracts, we considered trying to write into this section a provision protecting the Government from fraud and extortion by so-called contract brokers. However, this subject should be covered by comprehensive legislation and I hope it will be appropriately taken care of at an early date.

[8] The bill applied only to naval contracts but it was amended on the floor to apply to all Government contracts. 88 C.R. 6412.

impressed with the argument that it would harm small business and retard its war production.[9]

Thus we have a deliberate refusal by the Senate to legislate that such contracts be unenforceable. Any remaining doubt of the Congressional intention that such contracts remain enforceable was dissipated when on July 14, 1943 the Congress enacted, as a stated substitute for H. R. 7304, Public Law 149, which was designed only to limit the profits from contingent fee con-

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[9] The Senate Committee later said (S. Rep. 255, 78th Cong., 1st Sess., p. 1):

> On July 20, 1942, the House of Representatives passed H.R. 7304, a bill prohibiting the payment of contingent fees for services in connection with the procurement of Government contracts. This bill was referred to the Senate Committee on Naval Affairs. Many letters were received by the committee from trade associations, chambers of commerce, and reputable businessmen, protesting enactment of this bill. The gist of their complaints were as follows: It would change the entire sales structure of the country and render it impossible for many manufacturers to function efficiently; it would work against the small- or medium-sized manufacturer and in favor of large corporations; and would delay the production effort of thousands of small manufacturers and thereby retard the war effort. A substitute bill was drafted which did not seek to prohibit the payment of contingent fees, but provided that if fees or commissions were found to be unreasonably high the amounts determined to be unreasonable should be deducted from the amounts payable under the Government contracts. The War Department, the Navy Department, and the House Naval Affairs Committee would not accept the proposed substitute, and H.R. 7304 was not enacted.

A similar statement of the reasons for the failure of H.R. 7304 was made by Mr. Vinson, Chairman of the House Committee on Naval Affairs, 89 C.R. 3626, 78th Cong., 1st Sess.

tracts.[10] Throughout the legislative history of Public Law 149 it was repeatedly emphasized that the bill did not outlaw such contracts, but was merely intended to limit the resulting profits.[11] There was even the sig-

[10] P.L. 149, 78th Cong., 1st Sess., 57 Stat. 564 (Appendix, p. 35, *infra*), as amended, 50 U.S.C. App. § 1191(a)(5). The bill amended the Renegotiation Act of 1942 by defining subcontracts, for the purpose of renegotiation, to include contracts under which any amount payable is contingent upon the procurement of a contract with the Government or under which any part of the services to be performed consists of soliciting or procuring a contract with the Government. A proviso states that the section is not to be construed "to affect in any way the validity or construction of provisions in any contract" with the Government "prohibiting the payment of contingent fees or commissions."

[11] H. Rep. 353, 78th Cong., 1st Sess., p. 3; S. Rep. 255, 78th Cong., 1st Sess., p. 2 (the bill "does not prohibit the payment of a contingent fee or commission").

In the course of the debates in the House, Mr. Vinson, chairman of the committee which had reported the bill, said:

> It must be remembered that this bill does not outlaw the payment of contingent fees or commissions. The legitimate agent, who is content with a reasonable fee, and who is willing to carry his fair share of the war effort without being made a millionaire, has nothing to fear from it. It is only the war profiteer, the man who is only willing to play his part on the home front if there are exorbitant profits in it for him, who will balk at this bill. All that is proposed is to provide the Departments with authority to keep these profits within reasonable bounds. (89 C.R. 3627)
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> There is nothing in this bill that prohibits any broker or manufacturer's agent approaching any department of the Government and offering to do business with them. We simply say, "If you do that, and your total income from Government business is more than $25,000 for a fiscal year, you are classified as a sub-contractor, and we have a right, under this bill, to renegotiate and to pay you that sum of money which we think your services justify you to receive. (*Ibid*, p. 3628)

See generally 89 C.R. 3625-9 (Mr. Vinson); 4646, 5863 (Senator Walsh).

nificant admission that the selling agents who had benefited from such contingent fee contracts had performed services of value in introducing Government procurement officers to the capacities of industry and in aiding the conversion of business to wartime production. H. Rep. 353, 78th Cong., 1st Sess., p. 3,[12] S. Rep. 255, 78th Cong., 1st Sess., pp. 2-3; 89 C. R. 3627.

This refusal to legislate, coupled with the later legislation, constitutes a plain Congressional recognition of contingent fee contracts and removes all basis for the ruling below that Executive Order No. 9001 states an inflexible public policy against the enforcement of contingent fee contracts. *Muschany* v. *United States,* 324 U. S. 49. In *Muschany* the Court concluded that any doubts as to the public policy against the commission arrangement there in question were dissipated when a limitation on such commissions was eliminated from an appropriation bill and when Congress, in still later legislation, recognized commission contracts as appropriate in certain circumstances. 324 U. S. at p. 68. In note 21 to the Court's opinion (*ibid.*), there is a reference to Executive Order No. 9001. The implication, clearly, is that paragraph 5, Title II of Execu-

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[12] At p. 3 of its report, the House Committee said:

> It cannot be said that these agents' services were entirely without value. Generally speaking, they were useful in bringing Government and business together, and sometimes they have assisted in adapting peacetime enterprises to war production. There is nothing in the proposed legislation which would prevent small manufacturers from availing themselves of the services of representatives of this character. It is recognized that many of them cannot afford to have a direct representative in Washington, and there is an advantage in being able to share the expense with other manufacturers.

tive Order 9001 is an additional recognition of the legitimacy of commission contracts.

The Congressional view evidenced in the refusal to enact H. R. 7304 and in the enactment of P. L. 149 is unchanged, to the present. As recently as last year and again last month, the Senate Subcommittee charged with the problem and the Government officers who appeared before it, took pains to reaffirm the difference between the legitimate representative of business, who performs a service both for his client and the Government, and the "influence peddler" who has nothing to offer but inaction, impropriety and corruption. *The 5-Percenter Investigation,* S. Rep. 1232, 81st Cong., 2d Sess., pp. 2-6.[13]; Hearing before the Senate Investigations Subcommittee, Committee on Expenditures in the Executive Departments, March 14, 1951, pp. 4274, 4313 (Senator Hoey, Chairman); 4276-80 (General Services Administrator Jess Larson); 4323 (H. K. Clark, Exec. Vice Chairman, Munitions Board); 4359 (Rear Admiral Ring, Military Director for Procurement, Munitions Board).

(2) Once the Executive Order is removed as an inflexible bar to enforcement of all contingent fee con-

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[13] At page 3 of its report, the Subcommittee said:

> While the subcommittee condemns the employment of persons who seek to obtain business by influence or other improper methods, it recognizes the need in certain cases for the employment of accredited sales representatives or manufacturers agents who properly represent their clients in the field of Government procurement.
>
> Whether a relationship between the company and its representatives is a bona fide one or not, in the final analysis, can be determined only by knowing whether it was so conceived in the minds of the parties involved.

tracts, there is no doubt but that petitioner's contract comes well within the rule of this Court enforcing such contracts. *Steele* v. *Drummond,* 275 U. S. 199; *Valdes* v. *Larrinaga,* 233 U. S. 705. For there is no evidence or even suggestion that petitioner did or intended to do improper acts in the course of his association with the military officers on behalf of defendant Flintkote. Quite the contrary. Both petitioner and the military men with whom he dealt had nothing to do with procurement (R. 85-8, 91-2, 100-2, 146). Petitioner made full disclosure of his representation of commercial interests (R. 38-40, 80, 88-9, 93). His association with the military camouflage officers was as a technician, working with his fellows in the Government on the merits of problems of camouflage, and pointing out his client's capacity to supply the needed materials (R. 80-1, 88-9, 92-3, 107-8). Petitioner's actions were "intended to reach only the reason of those sought to be influenced." *Trist* v. *Child,* 21 Wall. 441, 450. For such a case, the law in this Court is clear:

> It is legitimate to lay before the officers authorized to contract, all such information as may apprise them of the character and value of the articles offered, and enable them to act for the best interests of the country. And for such services compensation may be had as for similar services with private parties, either upon a *quantum meruit,* or, where a sale is effected, by the ordinary brokerage commission. And here it may be observed, in answer to some authorities cited, that the percentage allowed by established custom of commission merchants and brokers, though dependent upon sales made, is not regarded as contingent compensation in the obnoxious sense of that term, which has been

> so often the subject of animadversion by this court, as suggesting the use of sinister or corrupt means for accomplishing a desired end. They are the rates established by merchants for legitimate services in the regular course of business. (*Oscanyan* v. *Arms Co.*, 103 U. S. 261, 275-6).

Petitioner does not merely avoid illegality. He served well both the Government and his client. The officer in command of camouflage work at the Army Engineer Board, Fort Belvoir, testified to the merit of petitioner's ideas on camouflage and to the assistance given by petitioner (R. 79, 92). And petitioner was cited by the War Department for his work in the development of camouflage materials and equipment and his assistance in improving camouflage technique (R. 258). This Court his directed that in these cases "detriment to the public interest will not be presumed." *Steele* v. *Drummond*, 275 U. S. at 205. Here it may fairly be said that affirmative benefit to the public interest has been proven.

(3) The petition should be granted because the court below has for palpably inadequate reasons overturned the rule of public policy laid down by this Court and by state courts, including those of New York. The holding is, moreover, in direct conflict with decisions of the courts of New York, Missouri and North Dakota on the effect of the Executive Order. See pp. 12, 16, *supra*.

The petition should be granted, too, because of the urgency and importance of the question decided. We are again engaged in a great procurement effort in a time of declared national emergency. Proc. 2914, December 16, 1950, 15 F. R. 9029. As in so many other respects, the same conditions exist today with respect

to the question decided below as existed in December 1941. The First War Powers Act has just now been extended and on February 6, 1951 the President again exercised, by Executive Order No. 10211, the authority which he exercised in Executive Order No. 9001. P. L. 921, Jan. 12, 1951, 81st Cong., 2nd Sess.; Executive Order No. 10211, February 2, 1951, (Appendix, p. 32, *infra*).

The civilian side of the Government is making procurement contracts at the rate of 700,000 a year. The three military departments are operating at the rate of one and a half million "procurement actions" annually (not all contracts). In the case of every contract, the contractor will be required to disclose whether contingent fees have been paid or are payable. And in every such case disclosed, Government contracting and legal officers will have to decide the propriety of the contingent fee under the warranty clause required by Executive Order No. 10211 to be in the contract. Those officers have been proceeding on a case by case basis, considering all the facts and relying on the distinction made by this Court and the Congress between the "influence peddler" and the legitimate and useful representative of business. Hearing before Senate Investigations Subcommittee, Committee on Expenditures in the Executive Departments, March 14, 1951, pp. 4293, 4346, 4284-309, 4359 and *passim*. Since the warranty required by Executive Order No. 10211 is a substantial counterpart of that required by Executive Order No. 9001 (see n. 5, p. 15, *supra*), it is not too much to say that these Government officers will be thoroughly confused by the unqualified condemnation of contingent fee contracts which the court below professed to find in Executive Order No. 9001.

Perhaps even more important will be the effect of the decision below on the business community.[14] Despite the best effort of the Government to publicize its needs and to eliminate the middleman, small business needs qualified go-betweens in its dealings with Government procurement agencies. The time-honored custom of business, at least small business, is to pay only on a commission and contingent basis. The decision below condemns and stigmatizes this practice. If businessmen are thus deterred from hiring legitimate representatives to help them sell to the Government, they will inevitably make a smaller contribution to our industrial productivity.[15] Particularly will this be so in

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[14] The widespread interest in the question, in connection with the field of renegotiation alone, is suggested by the fact that the Prentice-Hall Government Contracts Service, on its first page explaining how the service should be used, uses this question as an illustration: "Example. Your company is interested in knowing if commissions paid to brokers or agents for the procurement or performance of war contracts are allowable as a cost on renegotiation."

[15] Mr. Jess Larson, General Services Administrator, recently said (Hearing before the Senate Investigations Subcommittee of the Committee on Expenditures in the Executive Departments, March 14, 1951, p. 4277):

> In my testimony before this Committee on September 1, 1949, I stated '. . . By far the great majority of the people engaged in this program (manufacturers' representatives) are honest, legitimate, hardworking and enterprising individuals who perform an honest service for their clients and who, in my opinion, more often than not perform a helpful service to the Government. Let us not, in the heat of condemning the unscrupulous operator, overlook the manner in which business is necessarily carried on and the valuable service that is sometimes performed by the various links in business transactions.'
>
> The shift from a peacetime economy toward mobilization more than ever re-emphasizes the importance of these words.

(Footnote continued on page 26)

connection with their employment of inventive technicians such as the petitioner to develop new uses for old materials. As a boy of nineteen in World War I, petitioner created the camouflaged sniper's suit (R. 21-22, 103). In World War II his ingenuity produced the inflated mock soldier, who with wonderful simplicity was dropped in numbers in the Pacific in one place when we were about to land at another (R. 26-7). Petitioner and others like him can find employment with business only on a commission and contingent basis. They and the businessmen whom they prod into producing the necessary samples for testing and standardization by the Government, will surely be deterred from joining together to develop new products for use in our present defense effort, if the decision below goes unreviewed.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition should be granted.

SAUL J. LANCE,
GEORGE H. SCHWARTZ,
Counsel for Petitioner.

April, 1951.

(Footnote continued from preceding page)

Many small businessmen have found themselves handicapped in obtaining Government contracts because of their fear of being publicly condemned if they engage the services of a legitimate representative to bring their product to the attention of proper Government officials.

APPENDIX.

EXECUTIVE ORDER No. 9001, Dec. 27, 1941, 6 F. R. 6787, as amended by Executive Order No. 9296, Jan. 30, 1943, 8 F. R. 1429:

The successful prosecution of the war requires an all-out industrial mobilization of the United States in order that the materials necessary to win the war may be produced in the shortest possible time. To accomplish this objective it is necessary that the Departments of War and the Navy and the United States Maritime Commission cooperate to the fullest possible degree with the Office of Production Management in the endeavor to make available for the production of war material all the industrial resources of the Country. It is expected that in the exercise of the powers hereinafter granted, these Agencies and the Office of Production Management will work together to bring about the conversion of manufacturing industries to war production, including the surveying of the war potential of industries, plant by plant; the spreading of war orders; the conversion of facilities; the assurance of efficient and speedy production; the development and use of subcontracting to the fullest extent and the conservation of strategic materials.

TITLE I.

1. By virtue of the authority in me vested by the Act of Congress, entitled "An Act to expedite the prosecution of the War effort", approved December 18, 1941, (hereinafter called "the Act") and as President of the United States and Commander-in-Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby

order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or the Navy Departments or the United States Maritime Commission. The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and the Navy Departments, and the United States Maritime Commission.

2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war, or for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies, facilities, utilities, machin-

ery, machine tools, and any other equipment, without any restriction of any kind, either as to type, character, location or form.

3. The War Department, the Navy Department, and the United States Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any percentum of the contract price, and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have been accomplished hereunder, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract, or the amendments or modifications thereof.

4. Advertising, competitive bidding, and bid, payment, performance or other bonds or other forms of security, need not be required.

Title II.

Pursuant to Title II of the Act and for the protection of the interests of the United States, I do hereby prescribe the following regulations for the exercise of the authority herein conferred upon the

War Department, the Navy Department, and the United States Maritime Commission.

1. Complete data shall be maintained by the War Department, the Navy Department, and the United States Maritime Commission as to all contracts and purchases which they respectively make pursuant to the Act and this Executive Order. The Secretary of War, the Secretary of the Navy, and the Chairman of the United States Maritime Commission shall make available for public inspection, as they may respectively deem compatible with the public interest, so much of such data as does not cover restricted, confidential, or secret contracts or purchases.

2. Notwithstanding anything in the Act or this Executive Order the War Department, the Navy Department, and the United States Maritime Commission shall not discriminate in any act performed thereunder against any person on the ground of race, creed, color or national origin, and all contracts shall be deemed to incorporate by reference a provision that the contractor and any subcontractors thereunder shall not so discriminate.

3. No claim against the United States arising under any purchase or contract made under the authority of the Act shall be assigned except in accordance with the Assignment of Claims Act, 1940 (Public No. 811, 76th Congress, approved October 9, 1940) (section 203 of Title 31 and section 15 of Title 41).

4. Advance payments shall be made hereunder only after careful scrutiny to determine that such payments will promote the national interest and under such regulations to that end as the Secretary of War, the Secretary of the Navy, or the

United States Maritime Commission may prescribe.

5. Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:

The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

6. Nothing herein shall be construed to authorize the cost-plus-a-percentage-of-cost system of contracting.

7. Nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits, or the payment of a fee in excess of such limitation as may be specifically set forth in the act appropriating the funds obligated by a contract. In the absence of such limitation, the fixed fee to be paid the Contractor as a result of any cost-plus-a-fixed-fee contract entered into under the authority of this Order shall not exceed seven per centum of the estimated cost of the contract (exclusive of the fee as determined by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission, as the case may be).

8. No contract or modification or amendment thereof shall be exempt from the provisions of the Walsh-Healey Act (49 Stat. 2036) (sections 35-45 of Title 41) because of being entered into without advertising or competitive bidding, and the provisions of such act, the Davis-Bacon Act, as amended (49 Stat. 1011) (sections 276a to 276a-5 of Title 40), the Copeland Act, as amended (48 Stat. 948) (sections 276b and 276c of Title 40), and the Eight Hour Law, as amended by the Act of September 9, 1940 (Public No. 781, 76th Congress) (sections 321 et seq. of Title 40) if otherwise applicable shall apply to contracts made and performed under the authority of this Order.

EXECUTIVE ORDER No. 10210, February 2, 1951, 16 F. R. 1049:

By virtue of the authority vested in me by the First War Powers Act, 1941, as amended by the act of January 12, 1951, entitled "An Act to amend and extend title II of the First War Powers Act, 1941" (Public Law 921, 81st Congress), hereinafter called the Act, and as President of the United States and Commander in Chief of the armed forces of the United States, and deeming that such action will facilitate the national defense, it is hereby ordered as follows:

PART I.

Under such regulations, which shall be uniform to the extent practicable, as may be prescribed or approved by the Secretary of Defense:

1. The Department of Defense is authorized, within the limits of the amounts appropriated and the contract authorization provided therefor, to enter into contracts and into amendments or modi-

fications of contracts heretofore or hereafter made and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts.

* * * *

10. Every contract entered into, amended, or modified pursuant to this order shall contain a warranty by the contractor in substantially the following terms:

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

* * * *

15. Nothing herein contained shall prejudice anything heretofore done under Executive Order No. 9001 of December 27, 1941, or any amendments or extensions thereof, or the continuance in force of an action heretofore taken under the said order or any amendments or extensions thereof.

16. Nothing herein contained shall prejudice any authority to utilize the provisions of the Armed Services Procurement Act of 1947 (62 Stat. 26) and regulations thereunder.

Sec. 4(a), ARMED SERVICES PROCUREMENT ACT OF 1947, 62 Stat. 21, 23, 41 U. S. C. (Supp. III), 153a:

Sec. 4.(a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2 (c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 2 (c) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

Sec. 304(a), FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, P. L. 152, June 30, 1949, 81st Cong., 1st Sess., 41 U. S. C. (Supp. III) 254(a):

Sec. 304(a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 302(c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 302(c) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or

secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

PUBLIC LAW 149, 78th Cong., 1st Sess., July 14, 1943, 57 Stat. 564, Sec. 1 (as amended, 50 U. S. C. App. Sec. 1191 (a)(5)), amended the first sentence of Section 403(a)(5) of the Sixth Supplemental National Defense Appropriation Act, 1942 (56 Stat. 982) to read as follows:

The term "subcontract" means (i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract or (ii) any contract or arrangement (other than a contract or arrangement between two contracting parties, one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party), (A) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts thereunder, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department

or a subcontract or subcontracts thereunder: *Provided,* That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract thereunder, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary to determine the nature or amount of selling expenses under subcontracts as defined in (ii) herein, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract thereunder.